

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 23 August 2005

BALCA Case No.: 2004-INA-309
ETA Case No.: P2002-PA-03381177

In the Matter of

AMERICAN PROPERTIES MANAGEMENT, INC.,
Employer,

on behalf of

JUVENTINO RODRIGUEZ SALINAS,
Alien.

Appearance: Daniel G. Anna, Esquire
Media, Pennsylvania
For the Employer and the Alien

Certifying Officer: Stephen W. Stefanko
Philadelphia, Pennsylvania

Before: **Burke, Chapman, and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification on behalf of Juventino Rodriguez Salinas ("Alien") filed by American Properties Management, Inc. ("Employer") pursuant to section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor, Philadelphia, Pennsylvania, denied the application, and the

Employer requested review pursuant to 20 C.F.R. §656.26. The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On April 30, 2001, the Employer, American Properties Management, Inc., filed an application for labor certification to enable the Alien, Juventino Rodriguez Salinas, to fill the position of "Foreman – Landscaping." (AF 109). The job duties for the position, as stated on the application were:

Coordinates landscaping projects and supervises landscaping crew that installs, maintains, and repairs landscaping projects at various commercial and residential sites. Includes planting plants and trees, spreading mulch, installing walkways, building and repairing small walls and other landscaping structures, etc. using hand tools, concrete, mortar & brick, gravel, and other general landscaping tools.

(AF 109). The stated experience requirement was two years in the job offered or in the related occupation of "Landscaping work." (AF 109).

The CO issued an initial Notice of Findings ("NOF") on February 3, 2003 (AF 105-106), and a Second NOF, dated September 3, 2003. (AF 93-95). On both occasions, the CO proposed to deny certification on the grounds that the Employer had not established that a permanent, full-time position exists. *See* 20 C.F.R. §656.3. The Employer submitted its rebuttal on March 10, 2003 (AF 101-102) and October 8, 2003 (AF 73-92), respectively. The CO found the rebuttal unpersuasive, and issued a Final Determination, dated May 7, 2004, denying certification. (AF 70-72). On or about June 11, 2004, the Employer filed a "request for reconsideration, or in the alternative, request for review." (AF 2-69). On June 25, 2004, the CO denied the Employer's Request for Reconsideration, and forwarded this matter to the Board of Alien Labor Certification Appeals. (AF 1).

DISCUSSION

In the initial NOF, dated February 3, 2003, the CO questioned whether the position is a permanent, full-time position that involves full-time work for the entire year. Furthermore, the CO requested the following documentation:

You must submit your payroll records for the last three years for all workers employed in this or similar positions. ***The weekly payroll records must show each employee by name, the number of hours worked, and gross wages. W-2 Forms are not acceptable.***

The records must establish that the job duties are performed on a continuing basis; that the job is career oriented and one for which the applicant has demonstrated a commitment; and that, historically, occupants of the position have remained year after year and are not financially dependent on obtaining other employment or unemployment compensation during intermittent breaks in the year.

A permanent labor certification cannot be issued for a temporary job.

(AF 106). (Emphasis in original).

In the first rebuttal letter, dated March 7, 2003, the Employer's Production Superintendent, Michael McKenna, stated, in pertinent part:

You have requested payroll records for the last three years for individuals that have held this position or a similar position in the company. Unfortunately, this would require us to photocopy about 1,000 to 1,500 pages of paper. We do not believe that you want this much information from us nor do we wish to reproduce this many documents. We base this conclusion in part on the fact that only one person functioned in the capacity of a Landscaping Foreman prior to last year. During 2002, we finally had to promote two other individuals to the position of Landscape Foreman. Therefore the only person in our organization that has functioned as a Landscaping Foreman for an entire year to date is Michael McKenna. If we must produce three years worth of payroll reports, we will do so. However, we would prefer to send just Mr. McKenna's payroll

information instead of the complete reports or some other summarized version of our reports such as monthly data if this is acceptable. We await your guidance on this issue.

... American Properties Management disagrees with your general determination that this position might be seasonal in nature. While American is busier in the warmer months and we employ more general labor, the work of our Landscaping Foreman does not stop in the winter. Tree work, building landscaping structures, hauling dirt and other materials and preparing major projects uses up what little free time our Landscaping Foreman might have in the winter. This is especially true when we have several long-term projects for the coming warm weather season.

We look forward to your response and will act in accord with your instructions.

(AF 102).

In the Second NOF, dated September 3, 2003, the CO cited the same deficiency as outlined above. However, in response to the Employer's initial rebuttal, the CO modified his instructions regarding the documentation required. In summary, the CO stated:

While you self-assert that you, Michael McKenna, Production Superintendent, who are the petitioning employer, have been the only person to function in the position of Foreman-Landscaping, prior to last year, you have not provided any documentation to support this. Obviously, in this position, you must have supervised the crew(s). **Our interest is in having you document that the position is a year-round, full-time position performing the job duties listed on the Application. There is no question that full-time work is available during the spring, summer, and fall months. It is not obvious that full-time work is available during the winter months.**

Therefore, you must submit payroll records for yourself and the workers you supervised for the months of December 2001, January, February, and March of 2002 and December 2002, January, February, and March of 2003. *The weekly payroll records must show each employee by name, the number of hours worked, and gross wages. W-2 Forms are not acceptable.*

Based on the fact that the alien began working for you sometime in 1998 and that you filed the Application in April 2001, you have been in business for some number of years and we expect that you should be able to document full-time winter months employment without any undue burden.

The documentation that is required is very clear. The reason that the documentation is required is very clear. We have reduced the amount of payroll records that we were requesting. A permanent labor certification cannot be issued for a temporary job. Therefore, the burden of proof is on you to document the permanent nature of the position.

(AF 95). (Emphasis in original).

The Employer's rebuttal to the Second NOF includes a cover letter by its attorney, dated October 8, 2003; quarterly payroll reports for Michael McKenna who was described as "the only individual who has acted as a Landscaping Foreman for multiple years;" and the quarterly records for the last four quarters for all workers, including three individuals who reportedly "function as Foremen." (AF 73-92). The Employer's counsel noted that Michael McKenna worked 13 weeks per quarter for all four quarters. Regarding the less experienced foremen, the Employer's counsel stated, in pertinent part:

Juventino Rodriguez became a Foreman on 10/1/02. E. Garth Jorgensen became a foreman on March 1, 2003. Kenneth P. Anderson became a Foreman on 7/15/03. While Mr. Anderson and Mr. Jorgensen are new enough to the Foreman position that their wage data indicates little regarding the issue of year round employment, Mr. Rodriguez' wage data indicates 13 weeks per calendar quarter and roughly equal pay for each quarter which should indicate regular year round work. Please also note on these reports that there are also other non-supervisory landscape workers that work year round.

(AF 73).

In the Final Determination, the CO found the Employer's rebuttal inadequate. The CO stated, in pertinent part:

You have totally ignored our request for the specific documentation of

weekly payroll records. The only conclusion we can reach is that you failed to provide the documentation is [sic] because you cannot show that the positions are year round and full-time.

We have given you not one, but two opportunities to provide weekly payroll records. In response you have submitted summary quarterly information. We clearly informed you that summary information does not document full-time year round employment.

Even though the alien was promoted to the Foreman position on 10/01/02 and has supposed [sic] been employed by you since 1998, you chose not to provide weekly payroll records as required. It should have been a simple task to document weekly year round employment. Instead you first argued that to provide the documentation was too burdensome and irrelevant; you were provided a second opportunity to provide the data, but ignored our request for weekly data and submitted summary data, which we specifically told you was not acceptable.

Based on your failure to document full-time employment by submitting weekly payroll records for the specific periods we identified in the NOF, the application submitted on behalf of Juventino Rodriguez Salinas remains in violation of Federal regulations and certification is denied accordingly.

(AF 69). (Emphasis in original). We agree.

The Board has consistently held that a petitioning employer must provide directly relevant and reasonably obtainable documentation requested by a CO. *See, e.g., Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*); *Kogan & Moore Architects, Inc.*, 1990-INA-466 (May 10, 1991); *Bob's Chevron*, 1993-INA-498 (May 31, 1994).

In the present case, the CO issued a Second NOF, in which he narrowed his request for documentation to accommodate the Employer's complaint that the requested documentation in the initial NOF was too burdensome to produce. Nevertheless, the Employer's second rebuttal did not include the less extensive documentation which the CO specifically requested in the Second NOF. To the contrary, the Employer provided less detailed, quarterly reports, which are insufficient to establish that the position offered is a full-time, permanent position.

Finally, we decline to consider any new evidence submitted by the Employer with its alternative, request for reconsideration and/or request for review (AF 2-69), because such evidence should have been provided with the Employer's rebuttal prior to the issuance of the Final Determination. The provisions of section 656.24(b)(4), which requires the development of evidence before certifying officers, "is an expression of the importance for labor certification matters to be timely developed before certifying officers who have the resources to best determine the facts surrounding the application." *Cathay Carpet Mills, Inc.*, 1987-INA-161 (Dec. 7, 1988)(*en banc*). Accordingly, the regulations preclude consideration of evidence which was not "within the record upon which the denial of labor certification was based." 20 C.F.R. §656.24(b)(4); *Fried Rice King Chinese Restaurant*, 1987-INA-518 (Feb. 7, 1989)(*en banc*). Here, the CO expressly denied the request for reconsideration without considering the additional evidence, noting that the Employer should have addressed the matter in its rebuttal. (AF 1). (Cf. *Construction and Investment Corp., d/b/a Efficient Air*, 1988-INA-55 (Apr. 24, 1989)(*en banc*)(where the CO's affirmance of the denial of labor certification was based on a consideration of the evidence submitted with the request for review, treated by the CO as a motion for reconsideration, such evidence was in the record upon which the denial was made and could be considered by the Board).¹

In view of the foregoing, we find that labor certification was properly denied.

¹ Although the post-Final Determination evidence is not properly before us, we note that if it were considered it would be problematic. As stated in its rebuttal, the Employer identified Michael McKenna as the only Landscape Foreman at the time labor certification was filed. (AF 73,102,109). However, the newly submitted documents reveal that Michael McKenna was apparently an employee of "McKenna Landscaping, Inc.," not American Properties Management, Inc. (AF 6-34).

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.